MARIA CHRISTIE DORAI RAJ

v.

LILA AHAMBBU & ANOR.

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CIVIL APPEAL NO. 9 OF 1982]
7 JULY 1986

TORT: *Accident - Appellant sustained some physical injuries - Learned Magistrate dismissed appellant's claim on ground that appellant had failed to establish a prima facie case - Appeal - Whether appellant had sufficiently established a prima facie case - Effect.*

This was an appeal by the appellant/plaintiff from the decision of the learned Magistrate wherein he dismissed her claim on the ground that she had failed to establish a *prima facie* case at the close of her case.

Although there were 11 grounds of appeal in the memorandum of appeal, the gravamen of the appellant's complaints was basically that the learned Magistrate had indulged in unwarranted speculation as to how the accident occurred and that he had not taken into sufficient consideration all the evidence adduced in the trial. The appellant also claimed that the learned Magistrate had wrongly invoked the presumption in s. 114(g) of the Evidence Act 1950 against her.

Held:

[1] The Court was satisfied that the appellant had sufficiently established a *prima facie* case.

[2] The appeal was allowed with costs, here and below, and interest.

[3] As the parties had agreed on a sum of RM4,500 as general and special damages the Court ordered the respondents to pay the said sum to the appellant.

[Appeal allowed with costs.]

Cases referred to:
Storey v. Storey [1960] 3 All ER 279
Whitehouse v. Jordan [1981] 1 All ER 267
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377
Yahaya bin Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117
Laurie v. Raglan Building Company [1941] 3 All ER 332
Wong Thin Yit v. Mohamed Ali [1971] 2 MLJ 175
Pal Singh v. State of UP [1979] AIR SC 1116

Legislation referred to:
Evidence Act 1950, s. 114illus.(g)

Other source referred to:
Law of Evidence, Woodroffe & Amir Ali's, 14th Edn., Vol. 3, p. 2698

For the appellant - Panjaram; M/s. Mayandi & Panjaram
For the 1st respondent - Bala Maheson; M/s. Bala Maheson & Co.

JUDGMENT

Lim Beng Choon J:

This was an appeal by the appellant/plaintiff from the decision of the learned Magistrate Sungei Patani wherein he dismissed the claim of the plaintiff in the Sungei Patani Magistrate Court Civil Action No. 41/79 on the ground that the plaintiff had failed to establish a *prima facie* case at the close of the plaintiff's case.

Before I proceed with this appeal, I should mention that at the close of the plaintiff's case in the lower Court, Counsel for the defendants asserted that the plaintiff had failed to establish a *prima facie* case. Thereupon the learned Magistrate rightly put to the learned Counsel to elect whether he would want to call evidence or to stand by his submission of no case to answer. From the appeal record at p. 12, it is clear that the learned Counsel chose to stand on his submission and that he would not call any evidence. Having made his choice the learned Counsel is therefore bound by it. Should I in considering this appeal hold that the appellant/plaintiff had established a *prima facie* case, there can be no further trial of the action. See *Storey v. Storey* [1960] 3 All ER 279 at 281F.

Although there were 11 grounds of appeal in the memorandum of appeal, the gravament of the appellant's complaints was basically that the learned Magistrate had indulged in unwarranted speculation as to how the accident occurred and that he had not taken into sufficient consideration all the evidence adduced in the trial. The appellant also claimed that the learned Magistrate had wrongly invoked the presumption in s. 114(g) of the Evidence Act 1950 against the appellant.

At the trial of the action in the lower Court, the only witness who gave evidence for the plaintiff was the plaintiff herself, the victim of the accident. In her evidence she said that at the material time she was riding her bicycle along a path which she described as a "cycle path", on her way home at Bunga Raya Park. Whilst cycling on that path, a car, which came from the opposite direction, encroached on her path and knocked her down. The collision took place somewhere near to a side road leading to Ibrahim school. As a result of the accident she sustained some physical injuries. Her evidence supported her allegation of negligence against the first defendant which allegation was stated in paragraph 6(j) of her statement of claim where she asserted that the first defendant drove on to "the path provided for cycles". (See p. 3 of the appeal record). Having examined the learned Magistrate's grounds of judgment, I note that in holding that the plaintiff had failed to establish a *prima facie* case, the learned Magistrate did not reject the evidence of the plaintiff on the ground that he found it unreliable or on the ground that there were any discrepancies in her oral evidence. Neither did the learned Magistrate question her credibility or demeanour. Her evidence to my mind is quite natural and straightforward and it was not shaken by the cross-examination of counsel for the defendants. On the contrary the finding of the learned Magistrate of no case to answer was substantially, if not completely based on his inferences drawn from the contents of certain documents included in the agreed bundle, A. Under such circumstances this Court in exercising its appellate jurisdiction is just as well placed to determine the proper inference that should be drawn and that this Court is entitled to form its own opinion thereon. This proposition is well exemplified in *Whitehouse v. Jordan* [1981] 1 All ER 267 at 268 where the headnotes say:

> Although the view of the trial Judge (who had seen and heard the witnesses) as to the weight to be given to their evidence was always entitled to greater respect, where his decision on an issue of fact was an inference drawn from the primary facts and depended on the

> evidentiary value he gave to the witnesses' evidence and not on their credibility and demeanour, an appellate Court was just as well placed as the trial Judge to determine the proper inference to be drawn and was entitled to form its own opinion thereon. Since the Judge's conclusion of fact that the defendant had pulled too long and too hard on the forceps was primarily an inference from the primary facts, no issue of credibility was involved. Accordingly, his conclusion was open to reassessment by the appellate Court and it was entitled to find that the evidence did not justify the inference that the defendant negligently pulled too hard and too long with the forceps.

In discarding the evidence of the plaintiff when she said she was cycling on a "cycle path" the learned Magistrate leaned heavily on the contents of the sketch plan (see p. 40 of the appeal record) to draw his inference that there was no such "cycle path". The only premise on which he arrived at such an inference seemed to be that there was no indication in the sketch plan concerning the "bicycle path". Thus he said:

> Sketch plan and photograph which formulated part of the agreed bundle of documents do not support the plaintiff's allegation. Thus documentary evidence did not show the existence of the so-called cycle path. How could an accident took place at a non-existent place.
>
> (See p. 16G and p. 17A of the appeal record)

At one stage I thought that the learned Magistrate was wrong to draw an inference from the sketch plan although it was included in the agreed bundle of documents when the truth of the contents of the sketch plan had not been expressly admitted by the parties concerned and the maker thereof was not called as a witness- see *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377. However upon a closer scrutiny of the notes of evidence it is clear that the trial was proceeded on the basis that both parties to the action had agreed if not expressly but at least by implication that the sketch plan depicted more or less an accurate scene of the accident as reproduced in the sketch plan. I say this because at the trial it was the Counsel for the defendant who in his closing address used it to support his contention that the plaintiff's evidence about cycling on a "cycle path" was not corroborated by the sketch plan while the Counsel for the plaintiff retorted that the defendant's motorcar had no business to be on the spot as shown in the sketch plan. At the hearing of the appeal before me both Counsel also relied heavily on the contents of the sketch plan to support their respective submissions. Such being the case it cannot be gainsaid that the parties had at least implicitly agreed to accept the contents of the sketch plan as depicting the scene of the place where the accident took place. It follows therefore that it was legitimate for the learned Magistrate to rely on the sketch plan to draw inferences therefrom in order to arrive at his conclusion notwithstanding that the maker of the sketch plan was not called. In support of this proposition reference may be made to the case of *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117.

Notwithstanding that the learned Magistrate could draw inferences from the sketch plan, the important question however is: had the learned Magistrate drawn a proper inference from the sketch plan to arrive at the conclusion that there was no such "cycle path"? I can say without hesitation that in this respect he had misdirected himself and I say so for the following reasons.

Firstly, he paid scant attention to the evidence of the plaintiff/witness for no good reason. Secondly, he proceeded to discard her evidence by drawing an unreasonable deduction or inference from the sketch plan. Thirdly, he relied on the first information report of the 1st defendant to demolish the case of the plaintiff.

As regards to the fact that the learned Magistrate had paid scant attention to the evidence of the plaintiff/witness I have touched on this point in the earlier part of my judgment and I just need to reiterate here that to my mind the evidence of the plaintiff/witness is natural and straightforward and should not be discarded unless there is some good reason for doing so and I can find none in the grounds of judgment of the learned Magistrate. As to the inference drawn from the sketch plan which adversedly affected the case of the plaintiff, the learned Magistrate, as I have said earlier seemed to base his deduction or inference on the premise that since there was no expressed statement in the sketch plan to denote the existence of such a "cycle path", it must follow that there never was such a "cycle path". With respect I am of the view that the learned Magistrate had not sufficiently appreciated the contents of the sketch plan to arrive at his conclusion. It is clear from the sketch plan that the boundary lines marking the edges of the tar road for the use of motor vehicles ("tar road") were indicated with the letters "A" and "C". The letter "C" showed the boundary line of the right edge of the tar road in front of the Ibrahim school. The fencing of the school compound was marked with the letter "D". Between the boundary line of the right edge of the road marked by "C" and the school compound fencing "D" there was clearly an open thoroughfare which certainly was not meant for the use of motor-vehicles as the boundary line of the right edge of the tar road terminated at "C". That being so the only reasonable deduction or inference that could be drawn is that thoroughfare was meant for the use of pedestrians and vehicles which were not self-propelled such as push carts and bicycles (for convenience I shall call that thoroughfare "pedestrians thoroughfare"). When the plaintiff/witness said she was cycling on a "cycle path" and that the 1st defendant's motorcar encroached on to that "cycle path" she could not have referred to any other path except that pedestrians thoroughfare (See p. 11E of the appeal record). Had the learned Magistrate directed his mind to the evidence of the plaintiff/witness and had paid proper attention to the sketch plan it is clear, on the balance of probabilities, that the 1st defendant's car did career off from the road on to the pedestrians thoroughfare and knocked the plaintiff down.

I also take note that the learned Magistrate also referred to the photographs included in the agreed bundle and said that the photographs also could not support the evidence of the plaintiff regarding a "cycle path". To my mind the photographs did not warrant any such deduction made by the learned Magistrate.

Another telling point which goes against the learned Magistrate's conclusion is that the sketch plan showed quite clearly that part of the respondent's motorcar had mounted or projected on to the pedestrians thoroughfare. In this respect it has often been held that if a motor-vehicle had mounted or projected over a pavement or a street refuge there is sufficient evidence of negligence. In support of this suggestion reference may be made to *Laurie v. Raglan Building Company* [1941] 3 All ER 332. There Lord Greene held that when an accident was due to the skidding of a motor-vehicle that by itself was not sufficient to establish negligence on the part of the driver of the vehicle but when a vehicle mounted or projected over a pavement that by itself was *prima facie* negligence because as His Lordship said at p. 336:

> In each case, the vehicle is in a position where it has no right to be. No vehicle has a right so to manoeuvre itself that its tail or its radiator, or whatever it may be, projects over the pavement to the injury of pedestrians lawfully there. Reliance for this suggested distinction was placed on *Wing v. Lord General Omnibus Co.,* but I am quite unable to find in that decision, which turned on some very special circumstances, any justification for such distinction. In my opinion, precisely the same principle applies in a case where a portion of the vehicle puts itself into a position over the pavement where it has no right to be.

In the present case, the vehicle was in a position where it had no right to be. The fact that in the present case the 1st defendant's motorcar had obviously mounted or projected on to the pedestrians thoroughfare at or near the place where the accident took place, should be sufficient to establish that the 1st defendant was *prima facie* negligent. Furthermore the brake mark as shown in the sketch plan measuring some 47 feet is another impressive indication that the 1st defendant was driving at a fast speed on a busy road near to a school. It is the duty of a prudent driver on approaching a school to reduce his speed as much as he can to avoid accidents. Indeed, the second limb of r. 23 of the Highway Code advocates such a requirement. For these reasons alone, it is my considered opinion that there is a case for the 1st defendant to answer.

As regards to the use of the first information report of the 1st defendant, it is without doubt highly improper for the learned Magistrate to make use of that report when the maker thereof was not called to give evidence. His error is compounded by the manner in which he made use of that report to throw out the plaintiff's case. In this connection it is to be noted that the learned Magistrate acceded to the allegation of the defendants as asserted by them in their joint statement of defence where it was contended that the accident was unavoidable since the plaintiff suddenly and without warning whatsoever "swerved from her side of the road to the opposite side of the road" (see para. 4(a) of the statement of defence enclosed at p. 5 of the appeal record). The learned Magistrate then proceeded to scrutinize the first information report lodged by the 1st defendant to the police about an hour after an accident (see p. 38 of the appeal record) wherein she reiterated her allegation. The learned Magistrate thereupon took upon himself to construct how the accident took place and concluded that the 1st defendant's version was more probable (see p. 18 of the appeal record). The steps taken by the learned Magistrate are highly contrary to all rules relating to the admission of evidence. In the first place the learned Magistrate in accepting the allegation of the 1st defendant as averred in her statement of defence, was virtually treating the averment in her pleading as a proven fact when the 1st defendant had not yet furnished the necessary evidence to establish the allegation pleaded by her in her statement of defence. Until the necessary evidence had been furnished, the allegation must remain a mere averment and could not be accepted as a proven fact. In the second place it is entirely wrong for the learned Magistrate to refer to the contents of the first information report to substantiate the allegation of the 1st defendant appearing in her statement of defence. It is well settled that if a complainant who made the first information report is not called as a witness (as happened in the present case) the statement made by him in that report could not be accepted as evidence as such statement would only be hearsay. Reference may be made to *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175 at 180 where the late Ali FJ said at p. 180:

> I have used the words "even if" advisedly, for in my view the police report in this case, though admissible by reason of s. 35 of the Evidence Ordinance, was not substantive evidence of the fact, as asserted by the defence, that the plaintiff was knocked down while crossing the road. The report of the police officer who recorded it could only say this: this is a statement by the appellant." To that extent the report was clearly hearsay evidence. Its inclusion in the agreed bundle was obviously on the assumption that the appellant would appear at the trial to testify. If he had done so, the report would undoubtedly have some value as corroborative evidence within the meaning of s. 157 of the Evidence Ordinance. But standing by itself for the purpose of the present dispute it was clearly hearsay.

Before departing, there is one more point which I should dispose of. The learned Magistrate thought it fit to invoke the presumption under s. 114 illustration (g) of the Evidence Act 1950 against the appellant on the ground that she had failed to call two witnesses who were purported to have witnessed the accident. In doing so I am of the view that the learned

Magistrate had unwittingly overburdened the onus of proof required of the appellant in the circumstances of the present case. Here the witness was herself directly involved in the accident and she saw how and where the accident took place. As her evidence should at least be taken into consideration and some credit be given to it, for the reasons which I have stated earlier in my judgment, the purported infirmities of her failure to call the other two witnesses should not arise, particularly when her evidence, if properly appreciated by the learned Magistrate has sufficiently established *prima facie* negligence against the respondent - see *Pal Singh v. State of UP* [1979] SC 1116 AIR . At any rate the Counsel for the defendants at the trial had not sufficiently laid a foundation for the invocation of the presumption under s. 114(g) of the Evidence Act 1950 since he had not elicited sufficient evidence which would show that the two other witnesses in question were available to the plaintiff for the purpose of giving evidence at the time of the trial which took place nearly 3½ years after the occurrence of the accident. In Woodroffe and Amir Ali's *Law of Evidence* 14th Edn., Vol. 3 at p. 2698 the learned authors said,

> A party asking the Court to draw against the other party an adverse inference of the nature indicated in Illustration (g) by reason of the non-examination of a witness by that other party must, whether the proceedings be a civil or criminal one, lay the foundation for it by eliciting evidence which would show that the witness in question was available to the other party for the purpose of giving evidence at the time of hearing. That evidence may be elicited, either in the course of the cross-examination of the witnesses examined by the other side (e.g., the investigating officer in a criminal case), or by leading evidence to that effect. Unless that foundation is laid, no question of drawing an adverse inference as indicated in Illustration (g) arises at all.

In the circumstances I am satisfied that the appellant has sufficiently established a *prima facie* case. I therefore allow the appeal with costs, here and below, and interest. As the parties have agreed on a sum of RM4,500 as general and special damages I hereby order the respondents to pay the said sum to the appellant.

Also found at [1986] 2 CLJ 152